UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Carlton Byrd, Petitioner, -against- Robert Ercole, Superintendent, Respondent.	09-cv-8536 (NSR) (LMS) ORDER ADOPTING REPORT AND RECOMMENDATION

NELSON S. ROMÁN, United States District Judge

Before the Court is Magistrate Judge Lisa M. Smith's Report and Recommendation ("R & R"), dated July 11, 2014, on petitioner Carlton Byrd's petition for a writ of *habeas corpus*, pursuant to 28 U.S.C. § 2254, from his June 21, 2006 conviction entered in Westchester County Court. Judge Smith recommended the Court deny the petition. The Court adopts the R & R as the opinion of the Court, and denies the petition.

Background[1]

On June 21, 2006, after a jury trial, Petitioner was convicted of the following criminal offenses: one count of attempted murder in the first degree; one count of murder in the second degree and criminal possession of a weapon in the second degree. On August 23, 2006, Petitioner was sentenced to an indeterminate term of 25 years to life in prison on his conviction of the crime of murder in the second degree and a determinate term of imprisonment of fifteen years, to be followed by a period of five years' post-release supervision, on the conviction of criminal possession of a weapon in the second degree. The sentences were to run concurrently.

[1] For a more complete recitation of the facts, refer to Judge Smith's R & R.

Petitioner appealed his conviction to the New York State Appellate Division, Second Department. The Appellate Division affirmed the judgment. Petitioner's leave to appeal to the New York Court of Appeals was denied on October 23, 2008. *People v. Byrd*, 11 N.Y.3d 830 (2008). On September 14, 2009 Petitioner filed a petition seeking a federal writ of *habeas corpus*, raising a number of grounds.

On July 11, 2014, Judge Smith issued the R & R recommending this court deny the petition for a writ of *habeas corpus* on the basis that Petitioner's claim should be denied as meritless, his argument that his Sixth Amendment right to counsel was violated by the admission of Preston Thomas's testimony at trial is meritless, Petitioner has exhausted this claim, Petitioner's ineffective assistance of trial counsel claim is procedurally defaulted, Petitioner's ineffective assistance of trial and appellate counsel claims are meritless, and Petitioner's ineffective assistance of appellate counsel claim is exhausted. Neither party has filed written objections to the R & R.

Discussion

A magistrate judge may "hear a pretrial matter [that is] dispositive of a claim or defense" if so designated by a district court. Fed. R. Civ. P. 72(b)(1); *accord* 28 U.S.C. § 636(b)(1)(B). Where a magistrate judge issues a report and recommendation,

> [w]ithin fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings or recommendations as provided by rules of court. A judge of the court shall made a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge.

28 U.S.C. § 636(b); *accord* Fed. R. Civ. P. 72(b)(2), (3). However, the district court may adopt those portions of a report and recommendation to which no timely objections have been made, provided no clear error is apparent from the face of the record. *Lewis v. Zon*, 573 F. Supp. 2d

804, 811 (S.D.N.Y. 2008); *Nelson v. Smith*, 618 F. Supp. 1186, 1189 (S.D.N.Y. 1985); *accord Feehan v. Feehan*, No. 09 Civ. 7016 (DAB), 2011 WL 497776, at *1 (S.D.N.Y. Feb. 10, 2011); *see also* Fed. R. Civ. P. 72 advisory committee note (1983 Addition, Subdivision (b)) ("When no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation."). The clearly erroneous standard also applies when a party makes only conclusory or general objections, or simply reiterates his original arguments. *Ortiz v. Barkley*, 558 F. Supp. 2d 444, 451 (S.D.N.Y. 2008).

Here, as neither party objected to Judge Smith's R & R, the Court reviews the recommendation for clear error. The Court has reviewed Judge Smith's R & R and finds no error, clear or otherwise.

Conclusion

Accordingly, the Court adopts Magistrate Judge Smith's Report & Recommendation in its entirety. The petition for a writ of habeas corpus is, therefore, DENIED. The Clerk is instructed to enter judgment accordingly and close this case.

As petitioner has not made a substantial showing of the denial of a constitutional right, a certificate of appealability will not issue. See 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore *in forma pauperis* status is denied for the purpose of an appeal. *See Coppedge v. United States*, 369 U.S. 438, 444-45 (1962).

Dated: July 31, 2014

White Plains, New York

SO ORDERED:

NELSON S. ROMÁN
United States District Judge